

Addressing Historical Wrongs in Post-Transition South Africa:

What role for transformative justice?

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Introduction

The concept of transformative justice has emerged in recent years as a response to perceived shortcomings in the standard toolkit of transitional justice, particularly in relation to addressing structural violence and violations of socioeconomic rights.¹ This chapter asks what role the concept of transformative justice might have in addressing the continuing effects of historical wrongs on South Africa in the post-transition period. There are three areas where the concept may add value to analysis and practice. These are, first, as a means by which measures seeking to address historical wrongs may be analysed and evaluated. Second, as an explicit framework for action shaping policymaking and practice. Third, as a means by which practices and policies may be understood in relationship to one another and in relation to addressing historically rooted structural violence and socioeconomic rights issues (Evans, 2013b). Here each of these possible uses is explored and evaluated with reference to the South African context. Risks and difficulties associated with adopting the transformative justice framework in one way or another are also discussed. The chapter concludes that transformative justice can most readily add value to the analysis of existing

¹ See, for example, Gready et al., 2010; Gready and Robins, 2014; Evans, 2013a; Evans, 2016.

and proposed actions (policy and practice) in relation to their contribution to addressing socioeconomic rights violations and other historical wrongs. It is also concluded that the transformative justice framework could play a role in implicitly or explicitly shaping practice. However, it is suggested that there are more significant obstacles to this than there are to the adoption of transformative justice as an analytical lens.

This chapter is not in large part concerned with defining transformative justice. This has been attempted by scholars elsewhere (including in this volume), with some key areas of overlap between most definitions (see, for example, Gready et al., 2010; Lambourne, 2009; Lambourne, 2011; Daly, 2002). It is worthwhile, however, briefly outlining what is and is not considered to be transformative justice for the purposes of this chapter. Here transformative justice is taken to be separate to transitional justice and to general ideas of social justice. Like transitional justice, transformative justice is concerned with addressing historical wrongs in post-conflict and post-authoritarian contexts. However, unlike transitional justice, transformative justice takes a particular focus on socioeconomic rights issues, structural violence and longer-term change, and upon the participation of affected communities, rather than a concentration on elite bargains (Daly, 2002; Gready et al., 2010; Gready and Robins, 2014).² Paul Gready and Simon Robins sum up the definition of transformative justice as ‘transformative change that emphasizes local agency and resources, the prioritization of

² Paul Farmer, for instance, argues that ‘Structural violence is violence exerted systematically – that is, indirectly – by everyone who belongs to a certain social order... In short, the concept of structural violence is intended to inform the study of the social machinery of oppression’ (Farmer, 2004: 307). See also Galtung (1969), Gupta (2013) and Farmer (1996) for further elaboration of the commonalities and distinction between structural violence and direct, interpersonal violence. On the question of who might qualify as elites, see McAuliffe (this volume).

process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level’ (Gready and Robins, 2014: 340). This means that in a context, such as South Africa, which could be termed ‘post-transition’ in that transitional justice mechanisms, such as truth commissions, trials, amnesties and reparations programmes, have largely run their course (successfully or otherwise), transformative justice remains a live concern (see, for example, Gready et al., 2010; Collins, 2010; Waldorf, 2012). Furthermore, this necessitates concern with processes other than the legal and quasi-legal instruments transitional justice (and ‘post-transitional justice’) typically focuses on (Evans, 2016). Bearing this definition in mind, the analytical utility of the transformative justice framework is discussed next, followed by exploration of its potential role in practice and a discussion of associated risks and difficulties.

Applying transformative justice to analysis

There are several possible analytical roles for the concept of transformative justice. Transformative justice brings together a number of ideas which might otherwise be treated as separate. In particular, transformative justice provides a framework by which (at least some) contemporary struggles for social change in post-transition contexts such as South Africa may be understood in a wider context and as connected to historical wrongs (such as apartheid, conflict and societal division) (Evans, 2013b; Evans, 2016; see also Harris et al., 2014).³ In this sense it is possible to evaluate and distinguish social justice and development

³ Some of the same principles can also be applied to measures seeking to address the effects of historical wrongs rooted in the deeper past, such as colonialism and slavery (see Evans and Wilkins, 2017; also Wilkins, this volume).

issues according to whether they are also transformative justice issues. This affects how contemporary conditions and struggles are understood and responded to from an intellectual and practical point of view. For instance, the profound inequalities in access to land and housing in South Africa are in large part the result of the ongoing influence of apartheid (see, for example, Gibson, 2011). Neither the advent of democracy, nor transitional justice mechanisms such as the Truth and Reconciliation Commission directly addressed these. Activism and advocacy around these issues has, however, continued.

With regard to housing, post-apartheid policy has been criticised for failing to provide enough, or adequate, housing (see, for example, Govender, Barnes and Pieper, 2011: 335-342; Goebel, 2007: 291-293; Bond and Tait, 1997). Post-apartheid housing policy has followed a market-oriented approach for the most part (Bond and Tait, 1997: 19-20), based on ‘the idea of providing subsidies to poor families to allow them to buy homes produced by the private sector’ (Gilbert, 2004: 17). This approach has been supported by the World Bank and other international development institutions and was pioneered in Chile from the late 1970s (Gilbert, 2004: 14). In South Africa the housing subsidy scheme is available to assist ‘virtually every family earning less than 3,500 rand’ (Gilbert, 2004: 27). However, the size, quality and location (on urban peripheries) of subsidised housing have been criticised.⁴ Health and environmental concerns have also been raised as well as criticisms of the bureaucracy and administrative processes associated with accessing the housing subsidy

⁴ There is some support for government claims to have made significant progress (especially with regard to the number of houses built). Allison Goebel, for instance, notes that, despite criticism of the policy, ‘the low-cost housing and service delivery programs have dramatically increased access to urban services by the poor’ and that the UN has recognised South Africa’s achievements in housing provision (Goebel, 2007: 291-293; see also, Gilbert, 2004: 18-19).

(Goebel, 2007: 291-296; Gilbert, 2004: 28-32). Indeed, '[t]o get onto a housing list may still require becoming a client of a local warlord or neo-traditional powerbroker' (Robins, 2008: 167).

It has been suggested that in attempting to address 'an estimated annual increase in the 'housing deficit of 200,000 families' the ANC government's housing subsidy delivery 'effectively chose quantity over quality' (Gilbert, 2004: 24). The government's arguable achievements in terms of the quantity of housing provision and the shortcomings in relation to housing quality are in part shaped by the government's approach to land reform. The current approach to land reform is largely market oriented and focuses more on restitution than on wider redistribution. Consequently, the overarching structures shaping unequal land access, distribution and ownership are largely unchanged (see Evans, 2016). In order to provide housing on well-located land it would be necessary to challenge the existing approach to land reform. The pressures to maintain this approach and the barriers to faster or wider reaching redistribution of land do not hinder house building on urban peripheries as much as on well-located land. It may be easier to provide a large number of houses in these locations. However, this can reinforce existing ghettoisation and result in houses being built without sufficient access to services, infrastructure and economic opportunities (Bond and Tait, 1997: 27; Goebel, 2007: 292).⁵ The provision of housing away from well-located land is in turn a factor contributing to the large number of recipients of housing subsidies who subsequently rent out or sell their houses (frequently at low prices), often in favour of living in informal settlements closer to economic opportunities (Goebel, 2007: 292; Robins, 2008: 92). Steven Robins further points out that many subsidy recipients also move back to

⁵ See also, personal interview with Luthando Ndabambi, Cape Town, 12 August 2010.

informal settlements ‘because the houses are too small and they cannot afford to extend using formal building materials, and/or they cannot afford to pay rates and service fees’ (Robins, 2008: 92). The housing subsidy programme provides subsidy recipients ‘with a physical structure but not the means to survive under conditions of extreme poverty’ (Robins, 2008: 92).

Moreover, given the scale of the housing deficit – even as compared to the large number of subsidised houses built – the quantity and rate of delivery of housing provided through the subsidy scheme has also been criticised as insufficient (Bond and Tait, 1997: 27; Robins, 2008: 167).⁶ In Cape Town, for instance, over a decade into democracy, there was ‘still a shortage of 250,000 houses’ (Robins, 2008: 167; on other parts of South Africa, see also Community Law Centre and Socio-Economic Rights Institute, 2013). This housing deficit, ghettoisation, and their effects, can be seen as a direct legacy of apartheid policies as implementation of Coloured Labour Preference Area and homelands policies have led to an ongoing ‘massive shortage of housing for black Africans’ in Cape Town (Robins, 2008: 167), as well as parallel problems in other parts of South Africa (see, for example, Community Law Centre and Socio-Economic Rights Institute, 2013). The overarching conditions of injustice surrounding realisation of the right to housing remain untransformed (Huchzermeyer, 2003; Bond and Tait, 1997).

Considering socioeconomic rights issues such as this in terms of the structural violence inflicted by apartheid allows questions to be raised with regard to the justness of the post-apartheid settlement and the justness or otherwise of policies aimed at addressing these issues

⁶ See also, personal interview with Martin Legassick, Cape Town, 4 August 2010.

(see Evans, 2013b: 101-102; Evans, 2016). For instance, in the case of land and housing rights in post-apartheid South Africa it may be concluded that the market-oriented policies put in place to address inequalities rooted in apartheid do not adequately challenge the apartheid-defined status quo. This leads to the further conclusion that some civil society actors promote transformative justice – that is to say, contribute to addressing ongoing effects of apartheid – more than others (Evans, 2013b: 191-192; see also Evans, 2018a). Those which challenge or contest the established, untransformative paradigm contribute towards transformative justice to a greater extent than those actors which accept or work wholly within the established paradigm (see Evans, 2018a).

Furthermore, this conception and application of transformative justice facilitates analysis which transcends the implied dichotomy of pre- and post-transition eras. Whilst perhaps not inevitable, the pinning down of the completion of transition to a date (in South Africa, in 1994 with the first democratic elections, or 1996 when the new constitution was finalised, for instance) can lead to neglect of the importance of pre-transition conditions to contemporary circumstances. From a transformative justice point of view these dates can be seen as largely artificial. It is the case that formal apartheid has come to an end and that transitional justice mechanisms have largely run their course. However, these mechanisms did not address all of the injustices of apartheid. Indeed, there is good reason for thinking that transitional justice mechanisms are not intended to, are not well suited to, and perhaps should not attempt to address structural violence or socioeconomic rights issues (Mani, 2008; Waldorf, 2012). Whilst the case has been made for addressing some socioeconomic rights issues through expanding the established focus of transitional justice mechanisms (for example, Mani, 2008; Pasipanodya, 2008; Skaar, 2011; Sankey, 2014; Schmid and Nolan, 2014), these mechanisms

cannot do everything. The expansion of transitional justice to attempt to address socioeconomic rights issues has been criticised, particularly in light of shortcomings in successfully carrying out its established narrower mandate (see Waldorf, 2012).

Indeed, a 2014 editorial in the *International Journal of Transitional Justice*, for instance, noted that ‘the implementation of every significant transitional justice initiative has fallen short in meeting the expectations of victims and their advocates’ (International Journal of Transitional Justice, 2014: 1). Analysis from a transformative justice perspective refocuses attention upon the areas which have not been (or cannot be) addressed by transitional justice mechanisms. Moreover, it is also necessary, from this point of view, to look beyond the transitional lens of these mechanisms and of the notion of *transitional* justice. In doing so further clarity may be provided on what concrete forms transformative justice might take as distinct from the established concrete institutional forms of transitional justice.⁷

The refocusing of analytical attention on to areas which are neglected by transitional justice (whether by accident or design) and on to the links between contemporary development and social justice issues and historical wrongs can also lead to increased analytical attention to the needs and the participation of affected communities (see, for example, Robins, 2011; Robins, 2013a). Frequently, socioeconomic rights issues and structural violence have a wider impact than that of violations of civil and political rights and direct personal violence (Waldorf, 2012: 175). In post-transition South Africa much of the population continues to be affected by structural violence rooted in the pre-transition period (such as poverty, economic and

⁷ See, for example, the rest of this book, particularly McGill, this volume; Lai and Bonora, this volume; Bollaert, this volume.

social inequalities, and the effects of a highly racialised class system), including many who did not experience (or are too young to have experienced) direct violence by the apartheid regime (see, for example, Robins, 2008; Gibson, 2011). Socioeconomic rights are also often prioritised by those who (civil and political rights-oriented) transitional justice mechanisms are intended to benefit (Waldorf, 2015: 175; Robins, 2011; Robins, 2013a). The recognition of this and the intellectual attention this entails in terms of understanding and validating the concerns and experiences of those affected by structural violence is an important role for transformative justice analysis. The need for a different response in policy and practice to that of typical transitional justice mechanisms is implied. This goes some way towards defining a distinct area in which transformative justice analysis contributes intellectually, illuminating areas of concern to those affected by conflict and authoritarianism (and potential responses to these) which might be obscured or de-emphasised in alternative analyses.

With regard to the possible value added by transformative justice analysis to discussions around post-transition South Africa it is worthwhile considering the particular influence transformative justice analysis may have upon understanding the role of civil society. A broad definition of civil society is used here, including, for instance, both contentious and non-contentious action taken by informal social movements and more formal organisations such as trade unions and nongovernmental organisations (NGOs).⁸ Civil society action is, of course, a broad field. It is possible, however, to apply a transformative justice analytical lens to those elements of civil society which engage in political and social action around human rights issues and socioeconomic grievances. Not all of these are of clear relevance to

⁸ For more detailed interrogation (and problematising) of civil society as a concept, see inter alia Robins, 2008: 7; Sen, 2010.

transformative justice, though an analysis from this point of view allows for action to be assessed with regard to whether it contributes to the addressing of historical wrongs (such as apartheid – and colonial – land dispossession) (see, for example, Harris et al., 2014). This has two aspects. One is to assess whether a given area of civil society action is concerned with a transformative justice issue. The other is to assess whether (or to what extent) the action taken contributes towards promoting transformative justice and why or why not.

At least some of the social movements and wider civil society mobilisation which came to prominence from the end of the first post-apartheid government can meaningfully be considered in terms of transformative justice (see Ballard et al., 2005). In at least some cases, civil society opposition to the post-apartheid government is not simply a question of ideological differences or of criticism of promises left unfulfilled. There is a deeper question about why it is important for certain political issues to be addressed, why civil society actors are concerned with them and what kinds of responses might resolve those issues. As already noted, with regards to activism around land and housing rights, for instance, it may be argued that current inequalities in access to land and housing continue to be shaped by apartheid. It is then possible to evaluate responses to these (see, for example, Evans, 2013b: 171-185).

As argued elsewhere (see Evans, 2013b; Evans, 2018a), actors such as the social movements which participate in the Poor People's Alliance and the (to some degree overlapping) groups which participate in the Housing Assembly display a higher degree of transformative potential in their responses to land and housing inequalities than those actors closely

associated with Shack/Slum Dwellers International (SDI).⁹ SDI's orientation towards working with government as a priority which takes precedence over grassroots militancy can act as a limiting factor in terms of transformative justice (see Evans, 2018a; also Podlashuc, 2011).¹⁰ Engagement in more contentious tactics and overt criticism of the state does not necessarily produce more transformative results (though it can). However, it is the case that the provision of a platform for the participation of affected communities in shaping priorities and approaches (potentially including contentious tactics) – contributes to transformative processes (see Evans, 2013b; Evans, 2018a). There are also challenges and limitations in the approaches taken by Poor People's Alliance linked social movements such as the Western Cape Anti-Eviction Campaign and the shack dwellers' movement Abahlali baseMjondolo, and by the Housing Assembly (which links together community based and social movement organisations in Cape Town with an NGO – the International Labour Research and Information Group – and the local structures of the South African Municipal Workers' Union).¹¹ It is, nevertheless, the case that these actors are not constrained to working within the largely untransformative paradigm of the status quo in the same way as SDI (which

⁹ See also Poor People's Alliance (n.d.), as well as personal interview with Mncedisi Twalo, Cape Town, 4 July 2012; personal interview with Lorraine Heunis and Eleanor Hoedemaker, Cape Town, 7 August 2012; personal interview with Michael Blake, Cape Town, 6 July 2012; personal interview with Michael Blake, Johannesburg, 10 April 2015.

¹⁰ See, also personal interview with Sandra van Rensburg, Johannesburg, 13 March 2015.

¹¹ See, for example, Pointer (2004); Mdlalose (2014); also personal interview with Soraya Hendricks, Cape Town, 11 July 2012; personal interview with Michael Blake, Johannesburg, 10 April 2015. Evans (2018a) explores this in greater detail.

concentrates on a particular methodology and set of priorities).¹² Furthermore, these actors put forward analysis which is overtly critical of the same structural conditions with which transformative justice is concerned and offer greater potential for politically responsible participation of diverse actors than SDI does (such as through the relationships between the grassroots community based elements of the Housing Assembly and the professionalised NGO and trade union elements).¹³

Transformative justice on the ground

In practice there are two broad areas in which the concept of transformative justice may play a role: in overtly shaping how policy and practice is framed or by implicitly shaping practice regardless of its explicit framing. This section of the chapter first discusses the latter possibility then moves on to a discussion of the former.

Regarding the question of whether practice or policies contribute to transformative justice it does not necessarily matter whether these are couched in the terminology of transformative justice. What matters more is the substance of the idea of transformative justice. In this sense a role for transformative justice in practice can be discerned. This links to the application of transformative justice as an analytical framework. It is possible to link contemporary struggles for the realisation of socioeconomic rights to the addressing of structural violence rooted in historic injustices. Indeed, these links are reflected in the practice of some actors

¹² See Podlashuc, 2011 and personal interview with Sandra van Rensburg, Johannesburg, 13 March 2015.

¹³ See Evans, 2018a. See also, Podlashuc (2011) and personal interview with Michael Blake, Johannesburg, 10 April 2015.

(such as those linked to the Poor People's Alliance and Housing Assembly) and there can be value added by this. Rhetorically, and in terms of the response invited by duty-bearers, this is important. For instance, the understanding that landlessness and housing inequalities in contemporary South Africa are symptomatic of the ongoing effects of apartheid suggests certain approaches to advocacy and policymaking and precludes – or at least questions – others (see Evans, 2018a). For example, the current policy paradigm regarding land reform (particularly redistribution), and its effects on the realisation of the right to housing (amongst other rights), may be challenged on the grounds that it is insufficiently transformative of apartheid conditions and is therefore insufficiently just (see, for example, Evans, 2016). For instance, market-oriented 'willing buyer, willing seller' processes have been very slow in facilitating redistribution of land and can be said to have failed to transform historically unjust conditions.¹⁴ Actors which work from this understanding can be said to be more likely to contribute to transformative justice in practice (see Evans, 2013b: 185, 189-193). Furthermore, acceptance of (or at least engagement with) this approach by key duty-bearers (such as the state) creates an opening for transformative justice-oriented policies to be pursued.

In addition to this, actors which facilitate the participation of those affected by structural violence contribute in this way to the practice of transformative justice. This is necessary to avoid the pitfalls of elite-oriented transitional justice (Daly, 2002; Waldorf, 2012). Moreover, participation can be beneficial both in terms of placing the concerns of affected communities on broader political agendas and by empowering individuals and communities through the process of participation (Tissington, 2012; Robins, 2013a; Gaventa and Barrett, 2010).

¹⁴ See, for example, James, 2007; Greenberg, 2004; Walker, 2008; de Satgé, 2013.

Regardless of how action challenging an untransformative policy paradigm is overtly described it contributes to the same idea as transformative justice. As mentioned above, at least some civil society actors in South Africa take this approach.¹⁵ Furthermore, actors taking this kind of approach have had some success in eliciting political and legal outcomes and in facilitating positive processes.¹⁶ Consequently, there is a case to be made that the idea of transformative justice (as it is called here) can play a role in implicitly shaping practice.

With regard to the role of transformative justice in explicitly shaping policy and practice more speculation is necessary. In South Africa there are not (as yet at least) civil society actors overtly framing their practice in terms of transformative justice, likewise government policies have not been explicitly put forward in these terms. This does not, however, preclude the possibility of practice being overtly framed in terms of transformative justice. There could be benefits to the adoption of such a framing. Policies or practices which explicitly adopt transformative justice framing can more easily be evaluated according to the aims and expectations of transformative justice. In practice this could be useful for holding states or other actors to account regarding their rhetorical commitments.¹⁷

¹⁵ See Evans (2013b) and Evans (2018a) for discussion of social movement organisations, NGOs and trade unions in a South African land and housing rights activist network in this regard.

¹⁶ See, for example, Tissington (2012); McKinley (2012).

¹⁷ See Uvin, (2004: 167-201) for a discussion of how rhetorical (and deeper) commitments to human rights framing can be used to hold development actors to account. See also Keck and Sikkink, (1998: 16-25) for a discussion of ‘accountability politics’ – holding powerful actors to account according to their stated commitments.

In South Africa the language of ‘transformation’ has some political currency (see, for example, South African Press Association, 2014; Congress of South African Trade Unions, 2013). Transformation has been defined in a variety of ways. For instance, Thiven Reddy argues that there is a ‘minimal consensus’ over considering transformation as addressing ‘the material “backlog”, the material and psychological poverty suffered by the majority of citizens which disadvantages them in exercising the rights enshrined in the new constitution and accessing the resources available in society’ (Reddy, 2004: 39). Others put forward understandings of transformation which focus upon poverty, economic inequality and patterns of discrimination relating to race, gender and sexuality, for instance (see, for example, Albertyn, 2007; Liebenberg and Goldblatt, 2007; Gumede, 2012). Much discussion of transformation has considered the extent to which the South African constitution, particularly its socioeconomic rights provisions, is – or can be interpreted to be – transformative (see, for example, Albertyn, 2007; Liebenberg and Goldblatt, 2007; De Vos, 2010). Recent mobilisations around universities, however, have drawn attention to transformation (and the at times overlapping concept of decolonisation) as applied to access to education, curricula content and demographic makeup of staff and student bodies amongst a number of other issues (see, for example, Qukula, 2015; Subramany, 2015; Ntuli, 2015).

At times the notion of transformation suffers from a lack of clarity (see, for example, De Vos, 2010). Nevertheless, there is potential for the practice of transformative justice to be linked to or integrated with existing notions of transformation.¹⁸ Indeed, there might be value added to the discourse around transformation through the adoption of transformative justice as an

¹⁸ Some commentators have, for instance, linked recent mobilisation of student activism to the addressing of structural violence (see, for example, Godsell, 2015).

approach to transformation. If the purpose and scope of transformative justice is clearly defined this could contribute to clarifying what transformation could or should be and what policies and practices contribute towards its realisation.

Particularly given the opening presented by the political currency of transformation in South Africa, it is not inconceivable that the framework of transformative justice could be adopted by, for instance, actors within or seeking to influence the government. Though, as discussed in the next section, there are some difficulties attached to this.

Risks and difficulties

So far this chapter has largely discussed the possible value added by a transformative justice approach. Here some of the risks and difficulties attached to adopting such an approach are explored. Firstly, there is the risk of vagueness or imprecision. The second difficulty is in relation to the overt adoption of transformative justice by practitioners as a framework for action and/or policymaking.

The risk of vagueness can affect both analytical and practical application of transformative justice. In essence this is the danger that transformative justice becomes an indistinct idea, that it fails to clarify anything intellectually or that it fails to offer any practical insights. This is a real danger, not helped by the current lack of a large unified or coherent literature theorising and defining transformative justice.¹⁹ The following questions are invited: if transformative justice is simply doing transitional justice better why not call it that? If

¹⁹ On this see, for example, McAuliffe, 2017. See also Evans, 2018a.

transformative justice is synonymous with social justice what purpose does the term serve? This chapter argues that for the term to retain meaning it is essential transformative justice is defined and applied as distinct from transitional justice and social justice, even if a degree of overlap is necessary (Evans, 2013b, 95-102; Evans, 2016; Skaar, 2011, Gready et al., 2010). Otherwise transformative justice may on the one hand become a superfluous buzzword or may on the other hand confuse matters through being applied inconsistently to multiple (unrelated) phenomena.²⁰ The idea of reconciliation, for instance, frequently suffers from this. If the dangers observable in the deployment of reconciliation as an ‘empty universal’ are to be avoided in efforts to pursue transformative justice then it is necessary to consider and clarify what transformative justice is in practice and how this relates – or departs from – existing notions and practices, such as those associated with transitional justice (see, for example, Renner, 2014; see also Evans, 2018b).

Consideration of the arguments recently made by Evelyne Schmid and Aoife Nolan, with regard to the extent to which transitional justice can address socioeconomic rights, may also be useful here (Schmid and Nolan, 2014). Schmid and Nolan identify that ‘the current debate on the economic and social dimensions of transitional justice frequently suffers from terminological and conceptual confusion’ (Schmid and Nolan, 2014: 362). There is some risk of the transformative justice concept contributing to this confusion if applied inconsistently to numerous phenomena. Schmid and Nolan claim an authoritative interpretation of economic and social rights (ESR) (Schmid and Nolan, 2014: 365-367). Unfortunately, however, little is

²⁰ These questions come to the forefront in reflection upon the range and content of papers presented at the Worldwide Universities Network’s (WUN’s) Transformative Justice Network conferences in 2011 and 2013 for instance (see WUN Transformative Justice Network, 2011; WUN Transformative Justice Network, 2013).

provided in terms of an argument supporting this position. Alternative understandings are merely posited as incorrect.²¹ Schmid and Nolan claim to provide ‘clarification’ to commentators whose views are not in line with their own and suggest that the implied failure of these commentators to understand the interaction between socioeconomic rights and transitional justice in their terms stems from the fact that many of these commentators are not lawyers (Schmid and Nolan, 2014: 371). Apparently unconcerned with the social construction of human rights or with the multiple different (including non-legal) interpretations, translations and applications of rights (see, for example, Stammers, 1999; Merry, 2006), Schmid and Nolan assert that transitional justice ‘has to engage with *rights as they are* – *as legal standards* – or, alternatively, use different vocabulary’ (Schmid and Nolan, 2014: 378; emphasis added). No convincing justification for this ‘legal positivism’ (see Stammers, 1999: 991-992) is provided.²² This chapter (and, implicitly, much of the book as a whole) argues that it is necessary to understand and approach human rights (and transitional justice) from a variety of (inter)disciplinary perspectives beyond the narrowly legal.

Despite repeatedly claiming that a narrow conception of socioeconomic rights is the correct one, Schmid and Nolan allow for multiple and broad interpretations of transitional justice and

²¹ For instance, at various points alternative positions are described as ‘improper use and misunderstanding of ESR language and concepts’, ‘misuse and misunderstanding of ESR standards’, ‘misapplications’, ‘inaccurate’, ‘problematic’ and as ‘an irritant to ESR advocates’. Schmid and Nolan’s claim that their ‘aim is not to denigrate the work’ of those they criticise does little to mitigate the fact that at times this appears to be what they do (Schmid and Nolan, 2014: 364-381).

²² Evidence is provided to support the case that socioeconomic rights are legally protected, however (Schmid and Nolan, 2014: 365-367).

‘do not take a stance on whether or when legalist approaches to transitional justice are suitable’ (Schmid and Nolan, 2014: 380, 364). This apparent openness to multiple and broad definitions of transitional justice coupled with an intolerance of alternative understandings of socioeconomic rights does seem likely to add to the conceptual confusion Schmid and Nolan hope to address through attempting to ensure ‘participants in the debate on socioeconomic considerations in transitional justice have a way to assess whether they are talking about the same thing’ (Schmid and Nolan, 2014: 377).²³ Moreover, in defining some ‘socioeconomic issues’ as broader than and separate to ‘rights’, Schmid and Nolan perform something of an intellectual sleight of hand (Schmid and Nolan, 2014: 363-364). Transitional justice is defined (broadly) in such a way as to easily include socioeconomic rights, making alternative notions such as transformative justice unnecessary (Schmid and Nolan, 2014: 380). Simultaneously, socioeconomic rights are defined (narrowly) in such a way as to exclude consideration of many of the issues which concern critics of mainstream transitional justice practice and advocates of alternatives such as transformative justice. This sidesteps key elements of the debate. For instance, Schmid and Nolan’s argument that ‘When armed forces burn houses, destroy crops, loot healthcare infrastructure or poison drinking water, these are violations of ESR that are neither structural nor relevant to the positive programmatic obligations imposed by those rights’ is persuasive (Schmid and Nolan, 2014: 373; see also Sharp, 2012). However, their emphasis on these sorts of socioeconomic rights issues obscures the question of how structural violence, inequalities and other socioeconomic ‘issues’ (not defined as rights by Schmid and Nolan) might be addressed in (post-)transitional contexts and whether transitional justice is the appropriate or best means to do so (Schmid and Nolan,

²³ The apparent conflation of laws and norms may also add to this confusion (see Schmid and Nolan, 2014: 365-367).

2014: 371-372). Many socioeconomic rights issues in post-transition South Africa – such as those surrounding access to land and housing, or education for that matter – *are* experienced structurally, rather than as a direct result of specific actions (see, for example, Gibson, 2011; Evans, 2016; Godsell, 2015).

Also problematic in Schmid and Nolan’s account is the failure to distinguish between broad claims of transitional justice advocates and the lived reality of transitional justice in practice. It may very well be true that there is ‘no reason why a consideration of ESR within the context of attempts to redress a legacy of past abuses could not be accommodated within the scope of [a] mainstream definition of transitional justice’ (Schmid and Nolan, 2014: 380-381). This says nothing about whether socioeconomic rights are frequently or successfully integrated into transitional justice in practice. Few would argue that socioeconomic rights issues were integral to transitional justice in South Africa (or indeed to the majority of transitional justice interventions).²⁴

Schmid and Nolan are critical of the suggestion made by some scholars that transitional justice processes typically focus on truth commissions, trials, amnesties and institutional reform, yet they nevertheless almost exclusively cite examples of these processes as means by which socioeconomic rights have been or might be integrated with transitional justice (see, for example, Schmid and Nolan, 2014: 369-370, 374, 376). Furthermore, discussion of the

²⁴ See, for example, Gready (2011); Waldorf (2012); Robins (2013a); Gready and Robins (2014).

practical scope and limitations of these tools in addressing socioeconomic rights issues is almost entirely absent.²⁵

It is right to question the false dichotomy between socioeconomic rights and civil and political rights (Schmid and Nolan, 2014: 371-377). However, Schmid and Nolan's proposals for incorporating socioeconomic rights into transitional justice in some ways highlight the need for transformative justice to be defined separately. Perhaps transitional justice cannot address the root causes of conflict or the broader socioeconomic issues Schmid and Nolan consider to be outside the remit of rights (Schmid and Nolan, 2014: 371-372; see also Waldorf, 2012). These still ought to be addressed. Transformative justice is one means by which a focus may be maintained on these issues and consideration may be given to tools and processes not typically associated with transitional justice. Transformative justice in this case is not merely doing transitional justice better; it is doing something different – though parallel – to transitional justice.

The second difficulty, regarding the overt adoption of transformative justice as a framework for action, is now considered. Whilst from an advocacy point of view there may be benefits associated with explicitly adopting transformative justice as a framework for action it is not clear that this is likely to happen in South Africa.²⁶ As it stands, explicit discussion of transformative justice (as opposed to the ideas which it links together) has largely come out

²⁵ This is despite being discussed in the very work Schmid and Nolan criticise (see Evans, 2013a; Schmid and Nolan, 2014: 380).

²⁶ For discussion of challenges and possibilities associated with transformative justice as an explicit framework see Gready, 2014.

of academic discourse (see, for example, Gready, 2014). Moreover, in itself, taking up transformative justice as an overt framework may not be particularly worthwhile for civil society actors. Framing action compatibly with others and according to the appropriate advocacy venue may be more important (Keck and Sikkink, 1998: 18; Tarrow, 2005: 165). The payoff associated with analysis and evaluation of policy and practice according to a transformative justice perspective (however framed) is both more obvious and more immediate than the possible payoff associated with explicitly framing practice in terms of transformative justice.

Recalling the above risk of imprecision, it is worth bearing in mind that changing the words describing action does not in itself change the nature of that action. It may be more use practically to facilitate the translation of the transformative justice concept into whatever vernacular form is meaningful and advantageous locally (see, Merry, 2006; Levitt and Merry, 2009). This may include overt transformative justice framing but need not. The abovementioned South African discourse around social and political transformation might indicate a possible opening for mobilisation explicitly framed as transformative justice in this context. However, it may not – though this does not preclude the pursuit of the ideas of transformative justice under an alternative framing.²⁷

²⁷ It is possible, for instance, that the established (though vaguely defined) discourse around transformation might act as a hindrance to the overt adoption of transformative justice – a similar term with some possible overlap in meaning – as a framework for action in South Africa.

Indeed, there is a risk that the pursuit of transformative justice as an overt framework might come at the expense of more effective translation and advocacy ‘venue shopping’ (Merry, 2006; Keck and Sikkink, 1998: 18). Civil society actors in South Africa engaging with issues which can be said to relate to transformative justice utilise a range of (sometimes overlapping) frames for action: human rights, development, anti-poverty, social justice and emancipatory politics, among others. Any of these framings may be equally or more effective than overt transformative justice framing under the right circumstances. Moreover, it is important for advocacy to take place in terms which are meaningful for and relevant to the affected communities participating. This is both to avoid the problems – such as disempowerment – associated with the top-down imposition of outsiders’ understandings and in order to maximise the chances of advocacy success.²⁸

Conclusion

In answering the question this chapter set out to address – whether it is analytically and practically useful to consider the shortcomings of transitional justice processes, and the need to address contemporary socioeconomic injustices, in terms of a struggle for transformative justice – three main conclusions may be drawn. Regarding analytical use, it is concluded that there is a role for and value added by applying the concept of transformative justice. In particular, analysis from a transformative justice perspective can refocus attention upon the areas which are not addressed by transitional justice and can usefully link together some

²⁸ See Robins, 2011; Robins, 2013a; Robins, 2013b; Merry, 2006; Levitt and Merry, 2009; Keck and Sikkink, 1998: 18; Jordan and Van Tuijl, 2000; Tarrow, 2005: 165.

issues relating to contemporary social justice and development with historical wrongs – and analysis of how these might be addressed.

Regarding practice, it is concluded that there is a strong case to be made for the utility of transformative justice in implicitly shaping practice regardless of how that practice is overtly framed. Analysis of contemporary socioeconomic rights issues in relation to whether they are rooted in historical injustice, and in terms of whether measures to address these sufficiently take account of this, allows practical contestation of policy and practice which maintains unjust conditions. Practice emerging from this analytical position can be said to follow the principles of transformative justice regardless of how it is explicitly framed. There is a weaker case, however, regarding the possibility of the overt adoption of transformative justice to frame policy and practice. Indeed, it may not always be beneficial for the pursuit of transformative justice to be explicitly framed as such.

The more significant role for transformative justice, then, is in shaping understanding of, and agendas for, practice in terms of linking together ideas concerning structural violence and socioeconomic rights and in foregrounding the importance of addressing historical wrongs associated with these, including regarding the participation of those affected in these processes. This is important nonetheless. Shifting the focus of analysis of socioeconomic rights issues in order to take account of historical roots of injustices and opening up attempts to address historical wrongs to greater consideration of structural violence potentially adds value to both the understanding of contexts such as post-transition South Africa and to attempts to address these issues in practice.

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